SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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NICHOLAS RIZZO,

Plaintiff,

- v -

PROGRESSIVE CAPITAL SOLUTIONS, LLC, and GENE WEISS,

Defendants.

INDEX NO. 650498/2011

MOTION DATE _____

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In motion sequence number 005, defendant Gene Weiss moves (1) pursuant to CPLR 304(a) and (c) (Method of commencing action or special proceeding), 306-a (Index number in an action or proceeding commenced in supreme or county court), and 306-b (Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause) for an order nullifying this action for breach of a guarantee on a promissory note; (2) pursuant to CPLR 2221 for leave to reargue his motion dated (motion sequence number 004), which sought an order, pursuant to CPLR 3211(a)(5) and (a)(8), to dismiss the case against him based on lack of personal jurisdiction over him and the expiration of the statute of limitations, and was denied on September 8, 2020, and upon reargument, for an order granting dismissal of this case.

In February 2011, plaintiff Nicholas P. Rizzo commenced this action by serving a summons, (NYSCEF Doc. No. [NYSCEF] 1) and a motion pursuant to CPLR 3213 (motion in lieu of complaint) seeking repayment on a promissory note in the amount of $400,000 (Note). (NYSCEF 8, Notice of Motion [mot. seq. no. 001].)

On April 21, 2011, Rizzo withdrew the summons and motion, and the court permitted the withdrawal in May of 2011, but failed to dismiss the case. (NYSCEF 10, Notice of Withdrawal [mot. seq. no. 001]; NYSCEF 11, Decision and Order [mot. seq. no. 001].) Rizzo took no action until December 5, 2017, when Rizzo filed a new motion for summary judgment in lieu of complaint against Weiss under the original index number. (NYSCEF 20, Notice of Motion [mot. seq. no. 002].) Weiss opposed it, challenging Weiss's signature as a forgery and filed an answer with counterclaim. (*See* NYSCEF 32, Opp. Brief; NYSCEF 25, Ernest Gellman aff.) Personal jurisdiction was not raised. The motion was granted on liability and the court directed a hearing on damages to be held on March 4, 2019. (NYSCEF 38, Decision and Order [mot. seq. no. 002].)

Weiss's new attorney, (NYSCEF 43, Notice of Appearance; NYSCEF 71, Consent to Change Attorney) filed a motion renew and reargue. (NYSCEF 44, Notice of Motion [mot. seq. no. 003].) Weiss disagreed with the court's decision in motion sequence number 002, which is not a basis for a motion to renew or reargue. (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [citations omitted], *lv dismissed* 80 NY2d 1005 [1992].) Accordingly, the motion was denied for that reason and being untimely and introducing facts that could have been introduced in the prior motion. (NYSCEF 77, Decision and Order [mot. seq. no. 003].)

In motion sequence number 004, Weiss moved to dismiss, pursuant to CPLR 3211(a)(5) and (a)(8), the action against Weiss based on the expiration of the statute of limitations, lack of personal jurisdiction over Weiss since the summons and 3213 motion in lieu of complaint were withdrawn, that plaintiff abandoned the case before resurrecting it after the statute of limitations expired, and failing to purchase a new index number. (NYSCEF 82, Notice of Motion [mot. seq. no. 004].) The motion was denied because none of this was raised in the two prior motions. (NYSCEF 130, Decision and Order [mot. seq. no. 004]; NYSCEF 137, Tr.)

The court referred the issue of damages to a Special Referee to hear and report. (NYSCEF 98 and 131, Referral Orders.)

Discussion

The background of this case is set forth in the court's decision on motion sequence number 002 and will not be repeated here. (NYSCEF 38, Decision and Order [mot. seq. no. 002].)

The first issue is whether Rizzo's action survived after his withdrawal of the summons and original 3213 motion in 2011. Under CPLR 304(a), "[a]n action is commenced by filing a summons and complaint or summons with notice." CPLR 3213 provides:

> "When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. ……. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise."

(CPLR 3213 [emphasis added].)

Motion sequence number 001 was not denied and therefore the moving and answering papers do not become the complaint and answer in the action.[1] As a result, Rizzo's withdrawal of the original 3213 motion in 2011 "could be equated to a situation where the summons is served without a complaint." (*Reiche v Schuster*, 47 Misc 2d 782, 783 [Dist Ct, Nassau County 1965].) "When the summons is filed and served without a complaint, it must be accompanied by a brief notice, commonly called a 'default notice,' as provided by CPLR 305(b)." (Siegel, NY Prac § 60 [6th ed 2021].) Here, Rizzo never served another summons. Thus, what was left after the withdrawal was nothing, not even a bare summons and there was no personal jurisdiction. (*Id.* ["The use of bare summons is now a jurisdictional defect and results in a dismissal for want of personal jurisdiction."]; *see also Parker v Mack*, 61 NY2d 114, 117 [1984] [holding that service of a summons without the notice did not confer jurisdiction over the defendant or constitute the timely commencement of an action].) However, lack of personal jurisdiction is waived if not raised in a motion to dismiss or a responsive pleading. (CPLR 3211[a] [8].) An objection to personal jurisdiction over Weiss was not raised until motion sequence number 004 and is thus waived.

Second, Weiss argues that Rizzo abandoned the case. (NYSCEF 153, Letter Brief [June 8, 2021].) Weiss relies on *Richards v Lourdes Hospital*, where plaintiffs initially filed the summons and complaint but then withdrew the complaint. (58 AD3d 927, 927-928 [3d Dept 2009].) There, the plaintiffs did not (1) file a new summons and complaint, (2) pay the filing fee, (3) secure a new index number, (4) effect service, or (5)

[1] Since there was no complaint, defendant's answer with counterclaim, (NYSCEF 25, Gelman aff) was a nullity. Without a complaint, there can be no answer.

file proof of service within the prescribed period (which was 2.5 years). (*Id* at 928 [citation omitted].) The Appellate Division found that the plaintiffs effectively abandoned the action. (*Id.*, *citing Matter of Gershel v Porr*, 89 NY2d 327, 332 [1996] [holding that withdrawal of an Article 78 proceeding, by withdrawing the order to show cause, is effectively abandonment of the action].) In this case, Rizzo did not serve a new summons with notice, summons and complaint, or summons with motion in lieu of complaint within a reasonable time after withdrawing the summons and original CPLR 3213 motion in 2011. Payment was due on the note on December 31, 2010, and accordingly, the six-year statute of limitations expired in December 2016. Rizzo failed to do anything before the statute of limitations expired. In effect, Rizzo abandoned the case by failing to take the necessary follow-up steps and the case should be dismissed. Rizzo does not get the benefit of six months under CPLR 205(a) for a new action.

Alternatively, Weiss moves to reargue the September 8, 2020 decision, (NYSCEF 130, Decision and Order [mot. seq. no. 004]) denying defendant's motion to dismiss. "A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion." (CPLR 2221 [d] [2].) However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [citations omitted].) The movant bears the initial burden on a motion under CPLR 2221. (*Id.*) The motion must be made within 30 days of service of the relevant decision with notice of entry. (CPLR 2221 [d] [3].)

Weiss argues that the court erred because plaintiff failed to buy a new index number after withdrawing the summons and motion in lieu of complaint. Plaintiff cannot resurrect an old action, but must purchase a new index number under CPLR 304, 306-a and 306-b. (*See Matter of Gershel v Porr*, 89 NY2d 327, 332 [1996].)

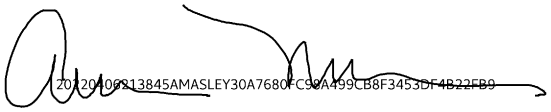
Relying on *Foley v Roche*, (86 AD2d 887 [2d Dept 1982], *People v Chatham*, (88 AD3d 1063 [3d Dept 2011]), and *Dreifuss v Cohen*, (177 AD2d 682 [2d Dept 1991]), the court finds that an exception should be made, and this court should reconsider its May 12, 2011 decision when the action should have been dismissed with the withdrawal of the summons and 3213 in 2011.

In *Foley*, the Appellate Division, Second Department permitted an untimely reargument motion where the case serving as a basis for the underlying order was overruled by the U.S. Supreme Court and Court of Appeals, an extraordinary circumstance. (86 AD2d at 887.) The Second Department held that a court may ignore the untimeliness of a reargue motion "in 'extraordinary circumstances' vitiating its effectiveness as a rule fostering orderly convenience, such as a change in the law or a showing of new evidence affecting the prior determination." (*Id.*) However, "[t]he error sought to be corrected must . . . be so 'plain . . . [that it] would require [the] court to grant a reargument of a cause.'" (*Id.*) In *Chatham*, the Appellate Division, Third Department granted an untimely reargument motion where the First Department case relied on in the underlying decision was overruled by the Court of Appeals. (88 AD3d at 1063.) The lower court relied on that First Department case when it denied defendant a hearing on resentencing. Finally, in *Dreifuss*, the Second Department held that "[g]ranting reargument because the basis for an original determination has since been

overruled by an appellate court is proper even if the period within which to appeal the original determination has expired." (177 AD2d at 682.) Here, the case has been a nullity since 2011 and an exception shall be made.

Accordingly, it is

ORDERED that defendant Weiss's motion is granted and the action is dismissed with costs and disbursements to the defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant.



4/6/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER		SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT		REFERENCE	